UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARLOS ESTRONZA,
Plaintiff,
- against -
RJF SECURITY AND INVESTIGATIONS, et al.,
Defendants.

REPORT AND RECOMMENDATION

12-CV-1444 (NGG) (JO)

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James Orenstein, Magistrate Judge:

Plaintiff Carlos Estronza ("Estronza") accuses defendants RJF Security & Investigations ("RJF"), Robert Foglia and Joseph Foglia (together with RJF, the "RJF Defendants") of breaching an implied contract of employment by wrongfully terminating him and of discriminating against him on the basis of his age and race in violation of federal and state law; and he further accuses defendants Lindsay Park Housing Corporation ("LPH") and Cora D. Austin ("Austin" or, and together with LPH, the "LPH Defendants") of tortiously interfering with his employment contract with RJF. Docket Entry ("DE") 33 (Second Amended Complaint) ("Complaint"); *see* 42 U.S.C. § 2000e *et seq.*, as amended ("Title VII"); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"); N.Y. Exec. Law § 296 ("NYSHRL"). The defendants have moved to dismiss all claims. DE 35; DE 41; *see* Fed. R. Civ. P. 12(b)(6). Upon a referral from the Honorable Nicholas G. Garaufis, United States District Judge, I now make this report, and for the reasons set forth below, respectfully recommend that the court deny the RJF Defendants' motion to dismiss Estronza's racial discrimination and hostile work environment claims, and grant the motions in all other respects.

I. Background

A. Facts

Defendants Robert and Joseph Foglia are the President and Vice President, respectively, of RJF, a security firm. Defendant Austin is the Chairwoman of LPH, which engaged RJF to provide security services at its Mitchell-Lama housing cooperative. In March 2007, RJF hired Estronza, who is

of Hispanic ethnicity, and who was at that time 44 years old. Complaint ¶¶ 9-11, 12-16. Estronza never signed a written employment contract with RJF. *Id.* ¶ 17.

When it hired Estronza, RJF gave him a booklet entitled "RJF Security & Investigations Rules and Procedures" (the "Rules") and required him to sign an acknowledgement that he had received it. *See* DE 17-2.[1] An RJF employee instructed Estronza to "thoroughly review" the Rules and told him "that this booklet would be his conduct bible, and that he would never be fired as long as he followed its rules and procedures." *Id.* ¶¶ 18-21.

Estronza claims that he relied on that promise in accepting RJF's offer of employment. Specifically, he alleges that before he started with RJF, he had been working as a security guard elsewhere on a night shift, but he needed to provide care for his elderly mother at night (she had a home health aide during the daytime only), and his former employer could not accommodate his request to work during the daytime. Estronza therefore began looking for other work. Based on RJF's promise to accommodate his need for a daytime schedule (which it ultimately did, albeit not immediately) and the promise of job security conditioned on following the Rules, Estronza left his prior job, abandoned other employment opportunities, and began to work for RJF. *Id.* ¶¶ 24-31.

In asserting his hostile work environment and discrimination claims, Estronza makes the following specific allegations:

- Estronza frequently volunteered for overtime work but was never assigned any. He was never found to have violated the Rules, yet was never promoted. *Id.* ¶¶ 63-67.
- Joseph Foglia "regularly hosted liquor, cocaine and sex filled parties" at the RJF main office, which managers and staff members attended while on duty. Estronza never attended such parties, and "expressed concerns" about them to Joseph and Robert Foglia and Austin. *Id.* ¶¶ 33-41.

[1] In discussing the Rules, I rely on the copy the RJF Defendants filed in support of an earlier motion, which appears to be the only complete copy in the record. *See* DE 17-2.

- Other employees were hired despite a lack of qualifications or were not terminated despite conduct, such as sleeping on duty, being arrested or being intoxicated on duty, that subjected them to immediate suspension or termination under the Rules. One such individual regularly attended the parties hosted by Joseph Foglia. *Id.* ¶¶ 43-53, 61-62.

- At unspecified times, Joseph Foglia made the following statements to Estronza:

  - "What kind of spic are you[?] … I thought all of you were the same" (*id.* ¶ 73);

  - "Why can't you be more like Vasquez[?] … He always does what I want, and the spic knows he would not stick around long if he didn't play ball" (*id.* ¶ 74); and

  - "Are you too old and can't get it up any more? This would mean that you cannot do your job properly around here" (*id.* ¶ 75).

- Joseph Foglia told other employees to "make that spic[']s life miserable." *Id.* ¶ 76.

- After Joseph Foglia took over responsibility for running RJF, "only the Caucasian personnel … [were] promoted and given raises" and only those security guards who regularly attended Joseph Foglia's parties were assigned overtime hours. *Id.* ¶¶ 76-77.

Around October 2010, Estronza's fiancée filed a lawsuit against the LPH Defendants alleging that they had discriminated against her disabled son. Estronza alleges that the defendants believed that he assisted her in gathering evidence for that suit, though he denies doing so. Estronza alleges that, as a result, he was assigned to a building "known to have problems" to which he had rarely been assigned previously, and that the RJF employees who regularly attended Joseph Foglia's parties began to ignore him. Additionally, after the disability suit was filed, Austin filed a complaint with RJF asserting that Estronza was not on duty in his assigned building on an unspecified date (although Estronza contends that security camera footage showed otherwise) and Austin "directed" Joseph Foglia to fire Estronza. Notwithstanding that complaint, in August 2011 Joseph Foglia conducted a performance evaluation in which he gave Estronza a score of ten (on a ten-point scale) in each of seven performance categories. *Id.* ¶¶ 79-82, 84-88, 91-93; *see* DE 36-1 at 28-29 (performance evaluation).

On September 19, 2011, there was a barbecue adjacent to a building on LPH property attended by employees of both RJF and LPH. Estronza was not working that day, and did not attend the barbecue; however, at some point during the barbecue, his fiancée walked by and was subjected to a lewd comment. When Estronza learned of the remark, he went to the barbecue. Finding the individual he thought had made the comment absent, Estronza was trying to locate a different individual who had witnessed the incident when the police were called. Estronza alleges he never threatened, confronted or yelled at anyone. He "left the premises" and was "on the public sidewalk" when the police arrived. Complaint ¶¶ 94, 97-101, 105-13.

While Estronza was speaking to the police, RJF supervisor Gregory Nesmith approached them and told the police that Estronza had been fired from his employment with RJF and was therefore no longer welcome on the grounds of LPH. Although the police determined that no altercation had taken place, Nesmith later told Estronza that he had been fired for his insubordination on September 19. The next day, Nesmith told Estronza to "watch his back" and that he would be "dealt with." Estronza filed a harassment complaint against Nesmith on September 22.[2] On September 23, LPH sent Estronza a notice of eviction that falsely alleged that he was living with his fiancée in her LPH unit and had created a disturbance by his actions on September 19. *Id.* ¶¶ 115-19, 123-27; *see* DE 36-1 at 30-33 (notice of eviction).

B. Procedural History

Estronza originally filed this action in state court on February 17, 2012, and the LPH Defendants removed the case to this court on March 23, 2012. *See* DE 1. All of the defendants then moved to dismiss Estronza's claims. The court partially granted and partially denied those motions. Specifically, it dismissed Estronza's claims of breach of contract, wrongful termination, retaliation, and

[2] The record does not reveal the disposition or status of that complaint.

tortious interference, all with leave to amend; and it denied the RJF Defendants' motion to dismiss the discrimination and hostile work environment claims based on the RJF Defendants' concession that Estronza had adequately pleaded those claims. *See* DE 23.

Estronza filed an amended complaint on April 3, 2013. DE 24. After the LPH Defendants sought leave to dismiss the new pleading, DE 24, and after I discussed the matter at a pre-motion conference, *see* DE 26, the parties agreed to litigate a dismissal motion after Estronza filed a further amendment of his claims. DE 27. Estronza filed the pleading now before the court on May 31, 2013, DE 33, and the parties filed the instant fully briefed motion on October 1, 2013. *See* DE 43 (RJF Defendants' memorandum) ("RJF Memo."); DE 44 (opposing declaration of Estronza's counsel) ("Opp.");[3] DE 45 (RJF Defendants' reply) ("RJF Reply"); DE 37 (LPH Defendants' memorandum) ("LPH Memo."); DE 40 (LPH Defendants' reply). The court referred the motion to me by order dated April 14, 2014.[4]

II. Discussion

A. Dismissal

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the court should consider the "legal sufficiency of the complaint, taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (citations omitted). To survive a motion to dismiss, the assertions in the

[3] Estronza's counsel filed identical declarations in opposition to both motions. *See* DE 39 at 1-9.

[4] Estronza uses concepts of race and national origin interchangeably to assert his claim that the RJF defendants discriminated against him because of his Hispanic ethnicity – even though Hispanic ethnicity denotes neither a person's race nor his national origin. *See* Complaint ¶ 10 (describing Estronza as being of "Hispanic national origin"); *id.* ¶¶ 32, 59 (alleging discrimination based on "national origin"); *id.* ¶ 77 (alleging that "Caucasian" workers received preferential treatment); Opp. ¶¶ 10-11 (referring to claim of "race discrimination"). For ease of reference, I will adopt the court's usage in its opinion resolving the earlier dismissal motions and refer to the claim as one of "racial discrimination." DE 23 at 3.

complaint must suffice to "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), meaning that the plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although for the purposes of a motion to dismiss the court must assume the veracity of the facts asserted in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quotation marks omitted).

B. Contract Claims

1. Breach of Contract

Estronza concedes that "[t]here was no contract of employment" between himself and RJF. *See* Complaint ¶¶ 17, 21; Opp. ¶ 21. He nevertheless contends that RJF's conduct in hiring him – requiring him to review the Rules and telling him that he "would never be fired as long as he followed" them – combined with his detrimental reliance on that promise of job security, "created an implied contract of employment" under New York law. *See* Opp. ¶¶ 27-29 (citing *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458 (1982); *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312 (2001)).[5]

The case law on which Estronza relies allows a plaintiff to establish the existence of an enforceable employment contract by showing "that the employer made its employee aware of an

[5] I reject the RJF Defendants' argument, RJF Memo. at 8, that Estronza's failure to identify who made the alleged statement or the date it was made renders it implausible. The alleged statement itself is not inherently implausible, and the lack of specificity about its provenance does not make it so. The drafters of the federal procedural rules demonstrably know how to impose heightened particularity requirements for pleading where they deem it appropriate to do so, *see* Fed. R. Civ. P. 9(b), but have not done so with respect to the claims at issue here. I also reject the defendants' arguments that Estronza's allegation of detrimental reliance on the alleged promise is implausible. Estronza explicitly alleges that he left an existing job and abandoned other employment opportunities based on his subjective reliance on both a perceived promise of job security (conditioned on following the Rules) and a promise of the work schedule he required. Here again, there is nothing inherently implausible about such assertions, and the RJF Defendants' hypertechnical parsing of the alleged sequence of events does not render them so.

express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment." *Lobosco*, 96 N.Y.2d at 316 (citing *Weiner*, 57 N.Y.2d at 466-67)). The defendants argue that such precedent is inapposite because Estronza fails to allege an express written limitation on RJF's right to terminate him. RJF Memo. at 6-9; LPH Memo. at 7-11. I agree.

Weiner recognizes a narrow exception to the New York rule that "an employment relationship is presumed to be a hiring at will, terminable at any time by either party." *Ferring v. Merrill Lynch & Co., Inc.*, 664 N.Y.S.2d 279, 279 (App. Div. 1997) (citing *De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 410 (1995)). Notwithstanding that decision, however, it is the law of this circuit that "routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements." *Baron v. Port Auth.*, 271 F.3d 81, 85 (2d Cir. 2001) (citing *Lobosco*, 96 N.Y.2d at 317). Rather, a court must consider all of the circumstances and the parties' course of conduct in determining whether the plaintiff has overcome the presumption of an at-will employment relationship. *Weiner*, 57 N.Y.2d at 466-67.

Estronza's allegations do not clear that hurdle. Even accepting all of his allegations as true, he can establish only an oral promise – but *Weiner* and the cases following it require an "express written policy" limiting the employer's termination rights. *See Cruz v. HSBC Bank, USA, N.A.*, 2014 WL 950066, at *3 (E.D.N.Y. Mar. 10, 2014) ("Subsequent attempts to create a breach of contract claim from company manuals and policies have been circumscribed to cases where there is an express limitation on the employer's unfettered right to terminate at will."); *De Petris*, 86 N.Y.2d at 410 ("Mere existence of a written policy, without the additional elements identified in *Weiner*, does not limit an employer's right to discharge an at-will employee or give rise to a legally enforceable claim by the employee against the employer."). There is no such express writing here, as the Rules merely list certain

"Grounds for Termination" without expressly limiting RJF's termination right to those grounds or otherwise indicating that they are the exclusive basis for termination. *See* Rules at 4.

At most, the Rules' recitation of certain specific grounds creates a negative implication that other circumstances would not warrant termination. But the case law plainly requires more. In *Weiner*, for instance, the handbook at issue expressly stated that the employer "will resort to dismissal for just and sufficient cause only." *Weiner*, 57 N.Y.2d at 460. Focusing on the parties' course of conduct, the court also noted that the plaintiff had signed an application form indicating that his employment would be subject to the provisions in the handbook and had received oral assurances on several occasions that employees could not be discharged without cause. *Id.* at 460, 465-66; *see also Sabetay v. Sterling Drug*, 69 N.Y.2d 329 (1987) (statement of policy not actionable absent limiting language and other "significant" *Weiner* factors); *Paolucci v. Adult Retardates Ctr., Inc.*, 582 N.Y.S.2d 452, 453 (App. Div. 1992) ("Neither oral assurances made to the plaintiff nor a general provision in an employee manual were sufficient to limit the defendants' right to discharge the plaintiff at any time, for any reason."). Estronza alleges that he was required to sign an acknowledgement that he received the Rules, but he does not allege that it in any way ratified (or even referred to) the termination policies set forth in those Rules; the blank acknowledgement form on the last page of the Rules similarly lacks any such ratification. *See* Rules at 10.

Rather than argue that something in the Rules or the acknowledgment form somehow sufficed to serve as an express written limitation on RJF's right to fire him, Estronza argues that the oral assurance he received was enough to limit RJF's ability to end his employment. But Estronza cites no legal authority for the proposition that an oral promise can have such a binding effect, and I have found none. To the contrary, the pertinent precedent affirmatively rejects Estronza's position. *See Soto v. Fed. Express Corp.*, 2008 WL 305017, at *6 (E.D.N.Y. Feb. 1, 2008) ("oral assurances of employment

only support an express written limitation but do not in and of themselves create such a limitation"); *Dickstein v. Del Labs., Inc.*, 535 N.Y.S.2d 92, 93 (App. Div. 1988) (verbal assurances and non-exclusive grounds for termination in handbook insufficient to overcome presumption of at-will employment). As a result, I must conclude that Estronza was an at-will employee, and that RJF accordingly could not have breached any contract it had with Estronza by firing him. I therefore respectfully recommend that the court dismiss Estronza's breach of contract claim.

2. Wrongful Termination

Having concluded that Estronza was an at-will employee, I necessarily also conclude that his termination cannot have been wrongful under the circumstances of this case. In any event, New York law "does not recognize the tort of wrongful termination." *Gencarelli v. Cablevision Sys. Corp.*, 2012 WL 1031441, at *3 n.3 (E.D.N.Y. Mar. 27, 2012) (citing *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300 (1983)). I therefore respectfully recommend that the court dismiss Estronza's wrongful termination claim.

3. Tortious Interference

To state a claim of tortious interference against the LPH Defendants, Estronza must adequately plead five elements: "(1) 'the existence of a valid contract between the plaintiff and a third party'; (2) the 'defendant's knowledge of the contract'; (3) the 'defendant's intentional procurement of the third-party's breach of the contract without justification'; (4) 'actual breach of the contract'; and (5) 'damages resulting therefrom.'" *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401-02 (2d Cir. 2006) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996)); *see CAC Grp. Inc. v. Maxim Grp. LLC*, 523 F. App'x 802, 806 (2d Cir. 2013) (dismissing tortious interference claim for failure to adequately plead the existence or breach of a contract). For the reasons set forth above, Estronza has not pleaded facts sufficient to overcome the presumption that he was an at-will employee, and therefore cannot

demonstrate that there was an actual breach of contract. As a result, I conclude that the court should dismiss the tortious interference claim.

To be sure, New York case law provides support for the proposition that an at-will employee can in appropriate circumstances plead a viable claim of tortious interference. But Estronza has not alleged such circumstances. To plead such a claim, Estronza would have to allege that he had a business relationship with RJF; that the LPH Defendants interfered with that relationship; that the LPH Defendants "acted with the sole purpose of harming [Estronza] or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort;" and that the interference resulted in the injury to Estronza's relationship with RJF. *McHenry v. Lawrence*, 886 N.Y.S.2d 492, 494 (App. Div. 2009) (quoting *Schorr v. Guardian Life Ins. Co. of Am.*, 843 N.Y.S.2d 24, 28 (App. Div. 2007)).

Even assuming that the Complaint's allegations suffice to allow an inference that the LPH Defendants acted either tortiously or with the sole purpose of harming Estronza – and the basis for making such an assumption is extremely thin – Estronza has plainly failed to allege a causal connection between the interference of which he complains and his termination. The only two discernible acts of interference that Estronza describes are alleged to have occurred in the aftermath of the October 2010 filing of a complaint by Estronza's fiancée against the LPH defendants. Specifically, Estronza alleges that his fiancée filed her complaint in or around October 2010, Complaint ¶ 79; that "[p]romptly" thereafter he was assigned to patrol a particular building that was notoriously plagued with drug trafficking and prostitution even though he had rarely been given such an assignment before, *id.* ¶¶ 84-86; that "[s]ometime after" the complaint was filed, Austin falsely complained to RJF that Estronza was not in his assigned building, *id.* ¶¶ 88, 91; and that "[s]hortly thereafter," Austin directed Joseph Foglia to fire Estronza. *Id.* ¶ 92. However, Estronza's allegations make clear that whatever else Austin may have accomplished by her attempts to undermine Estronza's position at RJF, she did not

cause him any actual harm. In August 2011 – ten months after Estronza's fiancée filed her lawsuit, and thus long after the acts of interference that Estronza claims Austin committed shortly thereafter – Estronza was still working for RJF and received a perfect job performance evaluation score from Joseph Foglia. *See id.* ¶ 93.

It was only a month later, as a result of the events surrounding an altercation at a barbecue, that Estronza lost his job with RJF. *See id.* ¶¶ 94-119. As a result, notwithstanding his conclusory allegations to the contrary, *see id.* ¶¶ 167-68, Estronza has not pleaded that the LPH Defendants' alleged interference with his employment caused him any harm. *See Amarsingh v. Jetblue Airways Corp.*, 409 F. App'x 459, 461 (2d Cir. 2011) (intervening misconduct by employee precluded finding of causation); *Dayes v. Pace Univ.*, 2 F. App'x 204, 208 (2d Cir. 2001) (extended gap between complaint and termination undermined finding of causation); *see also RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 405 (S.D.N.Y. 2009) (tortious interference with contract claim requires showing that "that there would not have been a breach but for the activities of the defendant"). For that reason as well, I respectfully recommend that the court dismiss the tortious interference claim.

C. Retaliation Claims

Estronza asserts that the RJF Defendants engaged in "retaliatory conduct" based on their mistaken belief that he had revealed confidential information to his fiancée. Complaint ¶¶ 140-48. To the extent Estronza's legal theory is that he engaged in protected activity and was subjected to an adverse employment action in retaliation, I conclude for the reasons set forth below that no such claim is viable and respectfully recommend that the court dismiss the claim.[6]

[6] To the extent the claim is predicated on the proposition that Estronza was fired for a reason not specified in the Rules, *see id.* ¶¶ 141-42, it fails for the reasons set forth in Sections B.1-2 above.

Both state and federal law prohibit an employer from retaliating against an employee for opposing a statutorily-forbidden discriminatory practice. *See* 42 U.S.C.A. § 2000e–3(a); NYSHRL §§ 296(1)(e), (7). To assert a retaliation claim under either law, Estronza must adequately allege that he engaged in protected activity, that RJF was aware of the activity, that he suffered a materially adverse employment action, and that there was a causal connection between the alleged adverse action and the protected activity. *See*, *e.g.*, *St. Juste v. Metro Plus Health Plan*, --- F. Supp. 2d ----, 2014 WL 1266306, at *25 (E.D.N.Y. Mar. 28, 2014). At a minimum, Estronza's retaliation claim suffers from the same defect as the tortious interference claim: as explained above he has not adequately alleged a causal link between his fiancée's lawsuit and his termination about a year later, following the altercation at the barbecue. I therefore respectfully recommend that the court dismiss Estronza's retaliation claims.[7]

A retaliation claim under municipal law would fail for largely the same reasons. *See* New York City Human Rights Law, New York City Administrative Code § 8–101 *et seq.* ("NYCHRL").[8] The

[7] I reject the RJF Defendants' argument that they are entitled to dismissal because Estronza has failed to allege that he exhausted the available administrative remedies. *See* RJF Memo. at 10. To be sure, federal law required Estronza, as a precondition to filing a claim under Title VII or the ADEA, to first file a charge with the EEOC within 300 days of his termination. 42 U.S.C. § 2000e-5(e)(1), 29 U.S.C. § 626(d); *see Almontaser v. N.Y. City Dep't of Educ.*, 2014 WL 3110019, at *5 (E.D.N.Y. July 8, 2014). But a plaintiff's failure to exhaust administrative remedies is an affirmative defense that a defendant must plead and can waive. *See Francis v. City of New York*, 235 F.3d 763, 767 (2d Cir. 2000) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). While a defendant may seek dismissal for lack of exhaustion in a pre-answer motion to dismiss, such a motion should normally be granted only "where the complaint itself establish[es] the circumstances required as a predicate to a finding that the affirmative defense applies." *Jordan v. Forfeiture Support Assocs.*, 928 F. Supp. 2d 588, 594 n.5 (E.D.N.Y. 2013) (brackets in original; internal citations and quotation marks omitted). The pleading now before the court does not establish a failure of administrative exhaustion – it is simply silent on the matter. The RJF Defendants' exhaustion argument also misses the mark with respect to the state law claims: far from being a precondition to filing suit, filing a complaint with the New York State Division of Human Rights acts as a jurisdictional bar to the later assertion of a judicial claim regarding the same alleged discrimination. *See Mendez v. City of N.Y. Human Res. Admin.*, 2005 WL 2739276, at *2 (S.D.N.Y. Oct. 24, 2005).

[8] Estronza has not actually pleaded any claim under the NYCHRL. To the contrary, his assertions of retaliation, discrimination, and hostile work environment all explicitly allege violations of "the laws of

essential elements of a retaliation claim under the NYCHRL, are similar to those under state law, with the exception that the city law prohibits more than just adverse employment actions: Estronza must plead that he engaged in a protected activity, that RJF was aware of that activity, that he suffered an action that would be reasonably likely to deter a person from engaging in a protected activity, and that there was a causal connection between the protected activity and the action. *Dimitracopoulos v. City of New York*, --- F. Supp. 2d ----, 2014 WL 2547586, at *13 (E.D.N.Y. June 4, 2014) (citing cases and N.Y.C. Admin. Code § 8–107(7)). But the slight difference in elements does not salvage Estronza's claim: the only retaliatory act for which he seeks relief is his termination – but he has not adequately pleaded a causal link between his protected activity and his termination, as explained above.[9]

D. Discrimination Claims

As set forth below, I conclude that there are two independent reasons to deny the RJF Defendants' request to dismiss Estronza's discrimination claims. First, they have affirmatively waived their right to seek dismissal by repeatedly acknowledging that Estronza has pleaded viable claims.

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the State of New York and of the United States of America." Complaint ¶¶ 147, 156, 160, 164. Nevertheless, the RJF Defendants – perhaps in an abundance of caution – address the merits of a claim under the NYCHRL in their brief, *See* RJF Memo. at 10, and I therefore do the same in the interest of completeness.

[9] I infer that Estronza also contends that he was assigned to patrol a particular building as a result of his employer's belief that he helped his fiancée gather evidence against the LPH Defendants. But it is not clear how that action could support a viable retaliation claim: Estronza does not allege that the assignment to patrol the building he describes would reasonably deter a person from engaging in protected activity, nor would such an allegation suffice in any event. *See Joyner v. City of New York*, 2012 WL 4833368, at *5 (S.D.N.Y. Oct. 11, 2012) (rejecting plaintiff's reliance, for purposes of establishing retaliatory action under the broader standard of the NYCHRL, on being required to work at a post that was "a particularly unsavory assignment" because "it [was] a post to which *someone* must be assigned" and because she was neither "assigned to this position on a permanent basis, nor [assigned duties at that post that] were profoundly different from those that she normally performed") (emphasis in original)). Thus even if the assignment was causally linked to the defendants' understanding that Estronza had engaged in protected activity, it would not support a cause of action for retaliation under the NYCHRL.

Second, that earlier acknowledgment reflected the fact that Estronza's allegations do state a cognizable claim for relief.

1. Waiver

When litigating their first motion to dismiss Estronza's complaint, after seeing Estronza's response to their opening brief, the RJF Defendants conceded that Estronza had pleaded "an adequate discrimination claim based upon age and national origin." DE 21 at 4. The court accordingly denied the motion as to those claims. DE 23 at 6. Indeed, the RJF Defendants now acknowledge that "the denial of the prior motion was occasioned by [their] voluntary abandonment" of their contention that the discrimination claims were subject to dismissal. RJF Reply at 3. Moreover, in seeking leave to file the instant motion, the RJF Defendants did not merely omit any mention of an intention to seek dismissal of Estronza's discrimination claims; their counsel affirmatively reiterated that those claims are "viable causes of action." DE 47 (transcript of pre-motion conference) at 17.

I have no quarrel with the RJF Defendants' contention that the filing of the Second Amended Complaint, in the aftermath of earlier litigation about the sufficiency of Estronza's claims, "open[ed] the door for defendants to raise new and previously unmentioned affirmative defenses." RJF Reply at 2 (citing *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999); *Plon Realty Corp. v. Travelers Ins. Co.*, 533 F. Supp. 2d 391, 394 (S.D.N.Y. 2008)). But a pleading's facial inadequacy is not an *affirmative* defense, and Estronza's amendment did nothing to make his discriminations claims more susceptible to a Rule 12(b)(6) motion. To the contrary, because the RJF Defendants had repeatedly made an explicit acknowledgment that Estronza's discrimination claims were adequately pleaded, he had no reason to supplement the allegations upon which he predicated those claims.

Against this backdrop, I necessarily conclude that the RJF Defendants have affirmatively waived their right to seek the dismissal of Estronza's discrimination claims pursuant to Rule 12(b)(6).

The problem is not that they have forfeited their request for such relief simply by waiting too long to make it – the applicable rule makes clear that that is not the case, *see* Fed. R. Civ. P. 12(h) – but rather that their "voluntary abandonment" of such a request, RJF Reply at 3, effected an affirmative waiver of a legal right they would otherwise retain. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). For this reason alone, the court can and should deny the RJF Defendants' motion to dismiss Estronza's discrimination claims.[10]

[10] I raise *sua sponte* a related issue the parties have thus far failed to address. As a precondition to filing his federal discrimination and hostile work environment claims, Estronza was required to file a timely charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d); *see Lore v. City of Syracuse*, 670 F.3d 127, 169 (2d Cir. 2012) (Title VII); *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998) (ADEA). The Complaint does not allege that Estronza has satisfied this requirement. As noted above in discussing the retaliation claim, however, Estronza's failure to exhaust his administrative remedies is an affirmative defense that is "subject to waiver, estoppel, and equitable tolling." *Francis*, 235 F.3d at 767 (quoting *Zipes*, 455 U.S. 385 at 393). The record of this case demonstrates not only that the RJF Defendants affirmatively waived a substantive challenge to the sufficiency of Estronza's discrimination and hostile work environment claims, but also that those defendants are willing and able to assert a defense based on a lack of administrative exhaustion when they see fit to do so – as they did in seeking the dismissal of the retaliation claim. However, their failure to do so thus far does not prevent them from doing so later: because the defense is not jurisdictional, it need not be raised in an answer or motion to dismiss; it may instead be raised as late as the trial. *See* Fed. R. Civ. P. 12(h).

The parties' failure to address the matter thus far is plainly inefficient: if Estronza did not in fact exhaust his administrative remedies, the parties may well proceed to a trial on the merits only to see it resolved on a motion for judgment as a matter of law at the close of Estronza's case-in-chief. *See* Fed. R. Civ. P. 50(a). Accordingly, if the court adopts my recommendation to deny the motion to dismiss the federal racial discrimination and hostile work environment claims, I will order the parties to engage in phased discovery: specifically, I will require the plaintiff, before proceeding to discovery on the merits, to disclose any evidence that he has satisfied the administrative exhaustion requirement. Once such disclosure has been completed, I will set an early deadline by which the RJF Defendants must file a motion to dismiss the federal claims for lack of exhaustion or, in the absence of such a timely motion, waive the right to assert such a defense later. *See* Fed. R. Civ. P. 16(b)(3)(B)(vi), (c)(2)(A)-(E), (c)(2)(P).

2. Merits

Federal procedural rules do not establish "a heightened pleading standard for employment discrimination suits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). Nevertheless, Estronza must allege sufficient facts "to state a plausible claim that also gives fair notice to the defendant of the basis for each claim." *Bakeer v. Nippon Cargo Airlines, Co.*, 2011 WL 3625103, at *22 (E.D.N.Y. July 25, 2011) (report and recommendation), *adopted by* 2011 WL 3625083 (E.D.N.Y. Aug. 12, 2011). Accordingly, while Estronza need not explicitly plead "specific facts that establish each and every element of a *prima facie* case of discrimination," *id.*, those elements do "'provide an outline of what is necessary to render [a plaintiff's employment discrimination] claims for relief plausible.'" *Pahuja v. Am. Univ. of Antigua*, 2012 WL 6592116, at *9 (S.D.N.Y. Dec. 18, 2012) (alteration in original) (quoting *Sommersett v. City of New York*, 2011 WL 2565301, at *5 (S.D.N.Y. June 28, 2011)). The court should therefore "consider these elements in determining whether there is sufficient factual matter in the complaint which, if true, gives Defendant[s] a fair notice of Plaintiff's claim and the grounds on which it rests." *Murphy v. Suffolk Cnty. Cmty. Coll.*, 2011 WL 5976082, at *5 (E.D.N.Y. Nov. 29, 2011).

To prevail on his employment discrimination claims under federal and state law, Estronza must allege that he is a member of a protected class, that he was qualified for his job, and that he suffered an adverse employment action in circumstances giving rise to an inference of discrimination. *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *see Conklin v. Cnty. of Suffolk*, 859 F. Supp. 2d 415, 424 (E.D.N.Y. 2012) (citing *Davis v. Oyster Bay-East*, 2006 WL 657038, at *8 n.12 (E.D.N.Y. Mar. 9, 2006), *aff'd*, 220 F. App'x 59 (2d Cir. 2007)) (Title VII, NYSHRL); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 316 (2d Cir. 1999) (ADEA).[11]

[11] I address separately below the more relaxed requirements under the NYCHRL.

An adverse employment action is a "materially adverse change" in the terms and conditions of employment. *See Lawson v. City of New York*, 2013 WL 6157175, at *7 (E.D.N.Y. Nov. 22, 2013) (citing *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)). Such action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities[;]" it must "affect employment in a way that is both detrimental and substantial." *Lawson*, 2013 WL 6157175, at *7 (quoting *Galabya*, 202 F.3d at 640; *Weeks v. N.Y. State (Div. of Parole)*, 273 F.3d 76, 87 (2d Cir. 2001)). "Examples of materially adverse employment actions include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004) (alteration, citation and internal quotation marks omitted). "Negative comments ... are not, standing alone, adverse employment actions, because mere comments do not materially affect employment." *Teachout v. N.Y. City Dep't of Educ.*, 2006 WL 452022, at *13 (S.D.N.Y. Feb. 22, 2006); *see also Scott v. City of N.Y. Dep't of Corr.*, 641 F. Supp. 2d 211, 231 (S.D.N.Y. 2009) ("[V]erbal abuse is typically insufficient to constitute an 'adverse employment action' because '[n]egative or otherwise insulting statements are hardly even actions, let alone 'adverse actions.'").

To prevail on his hostile work environment claim under federal and state law, Estronza must allege that he endured conduct that was objectively severe or pervasive in that it created an environment that a reasonable person would find hostile or abusive, that he subjectively perceived the conduct to be hostile or abusive, and that the hostile nature of the environment was based on his age or race. In assessing the work environment, the court must consider the totality of the circumstances, including the frequency and severity of the allegedly discriminatory conduct; whether it is threatening and humiliating rather than merely an offensive utterance; and whether it unreasonably interfered with

Estronza's work performance. The same standards apply to his claims under Title VII, the ADEA, and state law. *See Placide-Eugene v. Visiting Nurse Serv. of N.Y.*, 2013 WL 2383310, at *12 (E.D.N.Y. May 30, 2013) (citing *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007)) (Title VII); *Brennan*, 192 F.3d at 318 (ADEA); *Awad v. City of New York*, 2014 WL 1814114, at *7 (E.D.N.Y. May 7, 2014) (citing *Patane*, 508 F.3d at 115; *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000)) (NYSHRL).

To the extent Estronza might be understood to assert discrimination claims under the NYCHRL, the court must analyze them separately and independently from the corresponding causes of action under federal and state law, and in doing so must consider the totality of the circumstances and the overall context in which the challenged conduct occurs. In conducting that separate analysis of the hostile environment claim, the court cannot require Estronza to demonstrate that the challenged conduct was "severe or pervasive" – under the NYCHRL, such considerations are relevant only to the scope of damages. Nevertheless, the municipal statute is not a general civility code; Estronza could not prevail without proving that the RJF Defendants' conduct was motivated at least in part by discriminatory or retaliatory motives or animus, nor could he prevail if the RJF Defendants were to prove that the challenged conduct was nothing more than petty slights or trivial inconveniences. Thus, while dismissal is available under the NYCHRL where the challenged claim is truly insubstantial, "even a single comment may be actionable in the proper context." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 113 (2d Cir. 2013) (internal citations and quotation marks omitted).

a. Racial Discrimination

To support his racial discrimination claims, Estronza cites several comments, including epithets, that – although plainly troubling and indicative of the speakers' alleged racial animus – do not inherently rise to the level of an adverse employment action for purposes of federal and state law, *see, e.g.*, *Suarez v. N.Y. City Dep't of Human Res. Admin.*, 2011 WL 1405041, at *7 (S.D.N.Y. Mar. 24, 2011)

(finding that three race based comments were too isolated and sporadic to create a hostile work environment), though I assume they would suffice for purposes of the NYCHRL. Even under the more demanding standards of federal and state law, however, those comments suffice to support a claim when considered in the context of the allegation that Joseph Foglia told other employees to "make that spic[']s life miserable," Complaint ¶ 76, as well as the allegation that, after Joseph Foglia assumed day-to-day control of RJF's operations, only white employees received raises or promotions. *Id.* ¶ 77. Viewing the other comments in that context, a fact-finder could plainly conclude that discriminatory animus motivated Estronza's firing and that his work environment was made objectively and subjectively abusive on the basis of his Hispanic identity. I therefore respectfully recommend that the court deny the RJF Defendants' motion to dismiss Estronza's claims of racial discrimination.

b. Age Discrimination

Estronza fails to adequately plead that he was subjected to disparate treatment, an objectively hostile work environment or an adverse employment action based on age, and his age discrimination claims should therefore be dismissed. Estronza appears to base his age discrimination claims on a single disparaging comment by Joseph Foglia, who allegedly said to Estronza, "Are you too old and can't get it up anymore? That would mean that you cannot do your job properly around here." *Id.* ¶ 75. Even an obviously offensive comment such as that is plainly insufficient standing alone as the basis for finding a hostile work environment on the basis of age under federal and state law. *See*, *e.g.*, *Chick v. Cnty. of Suffolk*, 2013 WL 685661, at *4 (E.D.N.Y. Feb. 22, 2013) (finding that two isolated or remote comments were not sufficiently severe or pervasive); *Robinson v. Purcell Const. Corp.*, 859 F. Supp. 2d 245, 255 (N.D.N.Y. 2012) (finding that five gender based comments occurring over a two month

period were neither pervasive nor severe). I therefore respectfully recommend that the court dismiss Estronza's claims of age discrimination.[12]

III. Recommendation

For the reasons set forth above, I respectfully recommend that the court deny the motion of defendants RJF Security & Investigations, Robert Foglia, and Joseph Foglia to dismiss the plaintiff's racial discrimination and hostile work environment claims, and in all other respects grant the defendants' motions to dismiss.

IV. Objections

Any objections to this Report and Recommendation must be filed no later than September 15, 2014. Failure to file objections within this period designating the particular issues to be reviewed waives the right to appeal the district court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2);

[12] The challenged comment would present a closer call under the more relaxed standards of the NYCHRL. But while a single comment can be actionable under that statute, such a claim requires "the proper context." *Mihalik*, 715 F.3d at 113. Nothing that Estronza has alleged places the one challenged age-related comment in a context that would support an inference of discrimination on the basis of age. Indeed, Estronza does not place the comment in any context at all – he merely alleges that Joseph Foglia "has said" the words Estronza quotes without providing any information about the circumstances in which the comment was made. Complaint ¶ 75. To the extent the Complaint's other allegations illuminate the issue, they tend to undermine the proposition that the challenged comment reflected a broader hostility to Estronza on the basis of his age. To the contrary, the allegation follows a series of assertions that purport to describe a culture of debauchery at RJF, which Joseph Foglia promoted by hosting drug- and alcohol-fueled sex parties on company property – a culture in which those who participated were rewarded and those who did not, like Estronza, incurred Joseph Foglia's scorn. *See Id.* ¶¶ 33-42, 62, 73-74, 78. Moreover, the Complaint tells a parallel story in which the RJF Defendants came to believe that Estronza had disclosed confidential company information to his fiancée so that she could sue one of RJF's clients. Viewed against the backdrop of those two issues, there is no basis for a fact-finder to link any employment action about which Estronza complains to any age-based animus. Estronza does not allege that he was replaced by a younger employee, nor does he cite any way in which he or other workers within the protected age class were subjected to disparate treatment. I therefore conclude that even under the NYCHRL's more relaxed proof requirements, Estronza's allegation would not state a discrimination or hostile work environment claim on the basis of his age.

Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

SO ORDERED.

Dated: Brooklyn, New York
August 27, 2014

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge